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EXAMINER

REICHLE, KARIN M

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| ART UNIT | PAPER NUMBER |
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3761

DATE MAILED: 05/16/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/032,701

Applicant(s)

RICHLEN ET AL.

Examiner

Karin M. Reichle

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 11 February 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 11-20,31-40,42 and 44 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20,31-40,42 and 44 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 28 December 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date: _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date: _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Specification

1. The lengthy specification has not been checked to the extent necessary to determine the presence of all possible minor errors. Applicant's cooperation is requested in correcting any errors of which applicant may become aware in the specification.

For example:

Drawings

2. The drawings were received on 11-01-04. These drawings are not accepted by the Examiner. For example, in Figure 16, the line from the left 38 is still not dashed and commas are still shown between 45 and 49. In Figure 15, the line from the rightmost 74 is still not dashed.

3. The drawings are objected to because in Figures 17 and 18 the extraneous text should be avoided, i.e. such should be included in the detailed description instead. In Figure 3, the lines and arrows from 145 should be dashed to indicate underlying structure. The right hand side of Figure 14 is unclear. The lines from 51 should be dashed. In Figures 12 and 13, the numeral 128 should denote the same surface as shown in Figures 3-9B. In Figures 15-16, a line each numeral, e.g. 45 and 49, to the structure it denotes should be provided. Also the lines from and lines forming underlying structure, e.g. the lines from 14 and 16, elastics 36 and 38, sides 74 and layer 72, should be dashed. In Figure 16, the leg elastics are denoted both 36 and 38. In Figure 16, on the right side, the line from 37 should be dashed. Where is 70 as set forth on page 33, lines 30-31 shown? Corrected drawing sheets are required in reply to the Office action to avoid

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abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled “Replacement Sheet” in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Language Interpretation

4. The directional terms are defined as set forth on page 5, lines 4-27. “Releasably engaged” is defined as set forth on page 6, lines 12-19. “Fixedly secured” is defined as set forth on page 6, lines 20-24. “Line of weakness” is defined as set forth on page 7, lines 12-20. “Body panel” is defined as set forth on page 18, lines 3-7. “Nonwoven” is defined as set forth in the sentence bridging pages 19-20. Attention is invited to the paragraph bridging pages 25-26, i.e. while the testing protocol on pages 36 et seq is preferred it is not required, i.e. the claims do not limit the testing protocol to that set forth on pages 36 et seq. It is also noted that the length of the panel, see discussion of the testing protocols, has not been set forth. It is noted that the body

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panel is not limited to a single layer of material, i.e. line of weakness can be in only one layer of a multilayer panel as claimed. Also note that a fastener is claimed only in claims 16 and 35 and page 1, lines 5-19 and page 2, lines 15-18.

Claim Rejections - 35 USC § 102/103

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 11-20, and 31-40 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Igaue et al GB '024.

Claims 11-20: See claim language interpretation section supra and Igaue et al at Figures, abstract lines 3 et seq, page 2, last paragraph, page 9, line 17-page 11, line 2. The front panel is 1, the rear panel is 2 and is connected to the front panel by seam 8, the line of weakness is 9b, the elastomeric material is 14-15 and the fastener member is 5 and 6. Therefore, the Igaue reference clearly teaches all the claimed limitations except for the specific tear and tensile strengths. On page 2, lines 15-18 of the instant disclosure, Applicants set forth the purpose of the tensile and tear strengths is to allow breakage along a line of weakness to convert a pant-type garment to an open product without undue effort (It is noted that the terminology "undue effort" is considered relative). The claimed strengths are disclosed as those preferred. While Igaue et al does not explicitly teach the strengths (see Claim Language Interpretation section supra), see the portions of the Igaue reference cited supra which also teach an absorbent garment which converts from a pant-type garment into an open product simply by providing a line of weakness, i.e. a tear line, so as to allow the user to tear, i.e. break, the garment along such line. Thus, and additionally

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considering the lack of claiming a specific testing protocol, it is the Examiner's first position that there is sufficient factual basis for one to conclude that the Igaue et al panel would inherently include the claimed strengths when tested, at the very least, according to some testing protocol, and, at the very most, according to Applicant's preferred testing protocol. Note MPEP 2112.01. In any case, it is the Examiner's second position that even if the Igaue reference does not include the exact strength ranges, the general conditions of the claims are disclosed by the Igaue, see discussion of Applicant's purpose and the purpose of Igaue supra, and it is not inventive, i.e. it would be obvious to one of ordinary skill in the art, to discover the optimum or workable ranges, i.e. Applicant's ranges, by routine experimentation, In re Allen. 105 USPQ 233 (CCPA 1955). Finally, it is Examiner's third position that the claims are product by process claims and test characteristic claims, i.e. rather than setting forth the specific structure and composition of the panel and line of weakness, the claims define the end product by physical characteristics thereof which are determined by a test, i.e. equipment and process, used to measure such. As set forth in MPEP 2113, even though product by process claims are limited by and defined by the process, i.e. the processing of testing here, determination of patentability is based on the product itself, i.e. the end product. If the product in the product by process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by another process. As discussed supra, since the structure of the panel and line of weakness are not specifically set forth and the test used to determine the strengths is not specifically set forth, the end product as best understood is a panel with a line of weakness which will perform the purpose set forth by Applicants, discussed supra. Since such a product appears to be the same or similar to that of Igaue et al, see discussion supra, the claims are considered unpatentable.

With regard to claims 31-40, the steps of the method are inherently, see MPEP 2112.02, or are necessarily and inevitably performed during use of the Igaue et al device.

See also the Response to Arguments section, *infra*.

Claim Rejections - 35 USC § 103

7. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

8. Claims 42 and 44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Igaue et al GB '024 in view of Rosch et al '558, and thereby Van Gompel et al, EP '497 and '464.

Applicant further claims the front and rear body panels having terminal crotch edges spaced apart to define a gap and an absorbent composite bridging the gap and connected to the panels. Igaue et al teaches a unitary front and rear connected to an absorbent composite with a tearable line of weakness adjacent a side seam. However see Rosch et al '558 at Figure 2, col. 4, lines 17-23, and col. 5, lines 13-16, and thereby Van Gompel EP '497 (equivalent to U.S. Patent Application Serial No. 043132) at the Figures and US '464 at the Figures, i.e. pants with a tearable line adjacent a side seam designed with a unitary front and rear connected to an absorbent composite and the front and rear forming a side seam therebetween or with front and rear panels 18 and 20 or 24 and 26 having terminal crotch edges spaced apart to define a gap and an absorbent composite bridging the gap and connected to the panels and the panels forming a side seam therebetween. Therefore, to make the pants designed with a unitary front and rear connected to an absorbent composite of Igaue et al pants designed with front and rear panels

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having terminal crotch edges spaced apart to define a gap and an absorbent composite bridging the gap instead would be obvious in view of the interchangeability as taught by Rosch et al and Van Gompel et al. In so doing the prior art references teach the garment and method as using as claimed.

Double Patenting

9. The terminal disclaimer filed 11-1-04 has been placed in the application and approved.

Common Ownership

10. The statement filed 2-11-05 bridging pages 13-14 has been noted.

Response to Arguments

11. Applicant's 2-11-05 remarks with regard to the formalities, the rejection over Pozniak, the double patenting rejection and the lack of patentable distinctness over the '797 commonly owned reference have been noted but are either deemed moot in that the issue has not been reraised or deemed not persuasive for the reasons set forth supra. Applicant's 2-11-05 remarks with regard to the rejection of the claims over Igaue et al on pages 10-12 have been noted but are deemed nonpersuasive because they are narrower than bases for rejection, the claim language, the teachings of the prior art and the scope of the instant disclosure. For example, as set forth supra, the claims do not set forth even what specific testing protocol is used to determine the claimed tear strength. Nor does the specification limit the testing protocol to any one specific protocol. So while it is agreed that tear strength depends on many parameters,

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the tear strength also depends on the test used to determine it. See, e.g., Applicant's own remarks on page 14, second full paragraph of the 1-9-04 response, i.e. the size of the sample tested, i.e. the testing protocol used, makes a difference in the strength measured. Therefore, as set forth supra, there is sufficient factual basis to conclude that the Igaue et al device would inherently include the claimed strengths, at the very least according to some testing protocol and at the very most according to Applicant's preferred protocol. The claims do not require any specific materials and/or perforations of any particular structural dimensions. Furthermore, a reference that remains silent as to specific tear strengths does not teach away from the claimed tear strengths. In any case, the Igaue reference does not remain silent with regard to tear strength because it at least teaches that the tear strength has to be that which allows it to function as disclosed. See discussion supra. Still furthermore, Igaue et al does not teach away from a tensile strength of less than about 6.62 lbf (it is noted that such tensile strength is only required in certain dependent claims). The claim terminology "less than about 6.62 lbf" does not limit the strengths to those just less than 6.62 lbf, i.e. the terminology "about" allows some leeway from the value it describes. Finally, again the claims do not set forth even what specific testing protocol is used to determine such claimed tensile strength. Note again Applicant's own remarks on page 14 of the 1-9-04 response. Applicant's arguments bridging pages 11-12 are narrower than the claims which don't require the use of fasteners across the line of weakness in the manufacturing process and the disclosure which only express a preference for certain strengths. Finally, Applicant's remarks with regard to the claims being interpreted as product by process claims are not persuasive because a testing protocol, whatever it might be, must be performed to determine the claimed garment has been produced or claimed method has been performed.


Conclusion

12. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The cited but not applied art also teaches tear lines in absorbent articles.

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (571) 272-4936. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Schwartz can be reached on (571) 272-4390. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Karin M. Reichle
Primary Examiner
Art Unit 3761

KMR
May 10, 2005